



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-00-3

FACTS:

You are employed full-time as an attorney for the City of Boston (City) Public Facilities Department (Department). You also serve on the Board of Directors of the Allston-Brighton Community Development Corporation (ABCDC). You seek advice that raises the question: Is the ABCDC a state, county or municipal agency within the meaning of G.L. c. 268A, the conflict of interest law?

The ABCDC was created in 1980 pursuant to G.L. c. 180 by individual community activists. It operates in the City's Allston-Brighton neighborhood and conforms with the description of a community development corporation contained in G.L. c. 40F, §1 (40F/CDC Standards). As such, it is eligible to receive for qualifying projects financing from the Massachusetts Community Development Finance Corporation (State CDFC) pursuant to G.L. c. 40F, §4, and loans and grants from Massachusetts Department of Housing and Community Development (DHCD) for certain of its programs.

The ABCDC's purposes are set forth in its Articles of Organization (Articles) and are summarized in the notes to its 1998 and 1999 financial statements as follows:

The Agency's purpose is to improve the economic and social conditions in the Allston-Brighton neighborhood of Boston, Massachusetts. The Agency's activities include housing development, job creation, revitalization of declining commercial areas and resident involvement in development issues, and enhancement of cultural diversity in the community.

The ABCDC's primary focus has been to provide housing and, more recently, to promote economic development in the Allston-Brighton neighborhood.

The ABCDC's By-Laws, as amended (By-Laws), provide that anyone who is at least 18 years of age and who lives or has a place of business or employment in the Allston-Brighton neighborhood may be a member. Members must pay annual dues. The ABCDC currently has approximately 300 members, most of whom reside in the Allston-Brighton neighborhood. of Directors is to consist of up to 22 persons, 18 of whom are to be elected by the ABCDC's members and up to four of whom may be appointed by housing developments with which the ABCDC is affiliated. By-Laws § 4.03. The Board currently has 18 elected members and one member appointed by a nonprofit, joint tenants' council of the ABCDC's two nonprofit housing developments, described below. The ABCDC's officers - president, vice president, treasurer and clerk - are to be elected by the Board from among its members. By-Laws § 6.01. The Board hires and oversees the Executive Director, who hires the staff. The ABCDC has 12 full-time and 3 part-time employees.

The ABCDC's initiatives are consistent with the Articles. The Board formulates most of them. State and City authorities may sometimes propose initiatives for the ABCDC's consideration, but they do not control or dictate its undertakings, operations or agenda.

The ABCDC has been involved in developing more than 350 affordable housing units. It retains equity interests in and/or some degree of control over five housing developments (327 units).

For each of three of those housing developments, the ABCDC created a separate for-profit subsidiary, which is the general partner of a limited partnership whose limited partners are private investors. The ABCDC owns a majority interest in its for-profit subsidiaries. Each of the three limited partnerships owns its respective housing development.

The ABCDC negotiated with private property owners to acquire the other two housing developments for rehabilitation as affordable housing. The ABCDC established two nonprofit corporations, Commonwealth Housing, Inc. (Commonwealth Housing) and Glenville Housing, Inc., each of which assumed the debt for, took title to and is now operating one of the developments. Each entity has a 6-member board of directors, three of whom are appointed by the ABCDC's Board of Directors^{1/} and three of whom are appointed by the respective tenant councils. Commonwealth Housing and Glenville Housing pay the ABCDC annual fees of \$25,000 and \$20,000, respectively, to oversee the management of their developments.

The ABCDC and its subsidiaries and affiliates receive much of their funding under contracts and through grants and loans that are available on a competitive basis to entities other than community development corporations. Approximately 60% or more of the ABCDC's general operating revenues for the past four years were derived from private sources. That percentage is expected to be approximately the same for 2000.

Less than 10% of ABCDC's projected general operating revenues for the year 2000 are expected to be derived from or flow through City agencies. Approximately 30% of the ABCDC's general operating revenues for 2000 are expected to be derived from state and federal sources. The only benefit that the ABCDC currently receives from or through the State CDFC is a \$1000 annual fee for serving as a "sponsor" for a State CDFC loan to a small business enterprise in a neighboring community.^{2/}

The Articles provide that, upon the ABCDC's dissolution or winding up, "any disposition made of the assets of the Corporation shall be such as is calculated to carry out the purposes for which the Corporations is formed." Articles, Provision (n).

QUESTION:

Is the ABCDC a state, county or municipal agency^{3/} within the meaning of G.L. c. 268A, the conflict of interest law?

ANSWER:

The ABCDC is not a state, county or municipal agency for purposes of the conflict of interest law because it was created by private citizens without governmental involvement; it does not perform essentially governmental functions; a majority of its funding is from private sources; and no governmental agency controls or supervises its Board of Directors.

DISCUSSION:

When determining whether an entity, including a nonprofit corporation such as the ABCDC, is a governmental^{4/} agency within the meaning of the conflict of interest law, the

Commission uses a multi-factor analysis, which the Supreme Judicial Court has recognized as appropriate. *MBTA v. State Ethics Commission*, 414 Mass. 582, 588 (1993). Those factors are:

- (1) the means by which the entity was created (e.g., legislative, administrative or other governmental action);
- (2) the entity's performance of some essentially governmental function;
- (3) whether the entity receives or expends public funds; and
- (4) the extent of control and supervision of the entity exercised by governmental officials or agencies.

Also, as suggested in *MBTA*, we take into consideration the extent to which there are significant private interests involved in the entity under review or whether the state or its political subdivisions have the powers and interests of an owner. *MBTA*, 414 Mass. at 588-589. See also *EC-COI-95-10*; *95-1*; *94-7*.

As to these factors, we have said that “[n]o one factor is dispositive; rather the Commission will balance all of the factors based on the totality of the circumstances.” *EC-COI-92-13*. As we recently said, “[w]hen reviewing and balancing the factors, we are also mindful of the prophylactic purposes of the conflict of interest law.” *EC-COI-00-2*.

We now apply these factors and considerations to this case.

(1) Impetus for Creation

No statute, rule, regulation, order, ordinance or other law required the ABCDC to be created. The ABCDC was created in 1980 by private citizens. It does not appear that any governmental body was involved in its creation. See *EC-COI-95-10* (despite governmental officials' participation in and funding of organization and initial operations, entity created pursuant to contract that is to become a “viable, independent entity after three years” not governmentally created). Compare the following opinions, each concluding that the subject entity was governmentally created, *EC-COI-90-3*; *89-24*; *84-147* (confirmed by *89-1*); *84-66* (all involving non-profit corporations established by state agencies); *00-02* (strong and direct governmental impetus for creation of retirement board established by town meeting pursuant to a comprehensive statutory scheme); and *88-24* (municipal officials in a municipal agency created a non-profit corporation to further the agency's statutory purpose).

The ABCDC was established pursuant to G.L. c. 180, a comprehensive statutory scheme governing all Massachusetts nonprofit or “charitable” corporations, which does not automatically render any such corporation a governmental agency. The mere fact that the ABCDC conforms with the 40F/CDC Standards^{9/7/} does not mean that a governmental impetus existed for its creation. The 40F/CDC Standards are simply minimum eligibility requirements with which a particular community development corporation must conform, if it chooses, in order to qualify for financing for a particular project from the State CDFC and for eligibility for certain of DHCD's programs.^{9/7/} See G.L. c. 40F, §§1 and 4 and n. 6 below. See, e.g., *EC-COI-92-1* (nonprofit community action agency established by private citizens and complying with federal and state statutes prescribing minimum standards for funding and contract eligibility not governmentally created); *94-7* (nonprofit corporation satisfying state agency's qualification and eligibility criteria for state home care contracts was not governmentally created). Contrast

G.L. c. 121C (statutory scheme for economic development and industrial corporation, permitting a city council or town meeting to create one such “public body politic and corporate” for certain municipalities in designated areas of “substantial unemployment”).

(2) Essentially Governmental Function

We do not consider the provision of affordable housing or promotion of economic development to be “uniquely within the bailiwick of government.” *EC-COI-95-10*. Indeed, the ABCDC’s primary activities, providing affordable housing and promoting economic development, are frequently performed by private entities, both “nonprofits” and “for-profits,” often with federal and other governmental loans, grants, subsidies and tax and other incentives.^{9/} We recognize that many of the ABCDC’s purposes and undertakings involving the provision of affordable housing and promotion of economic development are public in nature and have significant public benefits, but that alone does not render them “essentially governmental functions.”^{9/} Compare *EC-COI-95-10*, n. 11 (police, fire services, municipal infrastructure (water, sewer, drainage, streets) and public school education are essential governmental services).

We also find it significant that even in G.L. c. 40F, the Legislature did not characterize a community development corporation that qualifies for State CDFC financing as performing an essentially governmental function. Rather, G.L. c. 40F describes a community development corporation quite differently from the State CDFC, which provides financing to certain community development corporations. A community development corporation is a “quasi-public nonprofit corporation organized under the General Laws to carry out certain public purposes.” G.L. c. 40F, §1 (emphasis added). In contrast, the State CDFC, which is authorized to provide financing to such community development corporations, is a “body politic and corporate” and a “public instrumentality” created by G.L. c. 40F, §2 to perform “an essential governmental function” (emphasis added).

(3) Whether the Entity Receives or Expends Public Funds

Approximately 60% or more the ABCDC’s funding in recent years has been derived from private sources, and only approximately 10% or less is derived from City sources. The balance is derived from state and federal sources.

(4) Extent of Governmental Control and Supervision

Neither the City nor any other governmental agency plays any role in constituting the ABCDC’s Board of Directors or appointing its officers, none of whom are required by the By-Laws to be governmental employees.^{10/} The Board hires the Executive Director who hires the staff, now 15 people. While ABCDC personnel undoubtedly meet with and report to various federal, state and City agencies and employees with respect to contracts, loans, grants, acquisitions and projects in which the governmental agencies are interested or involved, those governmental employees do not control or direct the ABCDC’s operations, except to the extent that contractual obligations and undertakings or permitting/approval requirements apply.

The Board formulates most of the ABCDC’s initiatives. While state and City authorities may sometimes propose initiatives for the ABCDC’s consideration, they cannot control or dictate its undertakings, operations or agenda. Further evidencing the ABCDC’s control of its own operations are its establishment of and relationships with its for-profit and nonprofit subsidiaries and affiliates.

(5) Additional Consideration

Finally, as to the additional consideration in the Commission's jurisdictional analysis, we note that the Articles provide that, upon the ABCDC's dissolution or winding up, "any disposition made of the assets of the Corporation shall be such as is calculated to carry out the purposes for which the Corporation is formed." This provision does not require or suggest that the ABCDC's assets be transferred to the state or any governmental agency. It does not appear that state or any other governmental agencies have the "powers and interests of an owner" any more than they would over other nonprofit corporations formed under G.L. c. 180.

After weighing the various factors and considering the totality of the circumstances, we conclude that the ABCDC is not a state, county or municipal agency within the meaning of G.L. c. 268A.^{11/}

In reaching our conclusion, we clarify our holding in *EC-COI-85-66*.^{12/} In that opinion, the Commission determined, without extensive review under our multi-factor analysis, that the subject community development corporation was a municipal agency. That conclusion appears to have rested, in large part, on the fact that the subject community development corporation conformed with the 40F/CDC Standards, rather than on an examination of the actual manner in which the community development corporation was established, funded, operated and controlled vis-a-vis governmental and private influences.

We now clarify that, when considering whether a community development corporation is a state, county or municipal agency within the meaning of G.L. c. 268A, we will review it, just as we do all other entities, by applying our multi-factor analysis. We will not consider a community development corporation to be a state, county or municipal agency for purposes of the conflict of interest law simply because it may conform with the 40F/CDC Standards, which may give it "threshold" eligibility for certain governmental or public financing, grant and other programs and contracts.

DATE AUTHORIZED: August 23, 2000

^{1/}The ABCDC's Board of Directors appointed you to serve on Commonwealth Housing's board of directors.

^{2/}It also receives a \$45,000 Community Enterprise Economic Development (CEED) grant from DHCD and approximately \$10,000 indirectly from the Massachusetts Office of Business Development.

^{3/}See G.L. c. 268A, §§1(p), (c) and (f).

^{4/}Except where otherwise expressly stated, as used here and elsewhere in this opinion, where the context admits, the words "government" and "governmental" shall connote Massachusetts state, county or municipal government.

^{5/}The CDFC regulations describe a community development corporation that may be eligible for CDFC financing as a "quasi-public nonprofit corporation organized under the General Laws to carry out certain public purposes" whose by-laws provide:

(1) it is organized to operate within a specified geographic area coincident with existing political boundaries;

(2) that membership in the corporation shall be open to all residents of said area who are eighteen years or older;

- (3) that at least a majority of its board of directors shall be elected by the full membership with each member having an equal vote;
- (4) that the by-laws of the Community Development Corporation shall provide that any other directors be either appointees of elected state or local government officials or appointees of other nonprofit organizations having as a purpose the promotion of development in the designated geographic area;
- (5) that said elections shall be held annually for at least one-third of the members of the board of directors so that each elected director shall serve for a term of at least three years;
- (6) that the designated geographic area shall be consistent with some existing, or combination of existing, political district, provided that the aggregate population of such geographic area shall not exceed one hundred and fifteen thousand people based on the most recent federal census.

G.L. 40F, §1.

^{6/}Some DHCD financing programs for which community development corporations are eligible do incorporate or adopt the 40F/CDC Standards. See 760 CMR 18.00 and 24.00 and 946 CMR 3.00. Others do not. See 760 CMR 19.02, 23.02. See also DHCD's CEED program created in 1978 through a state budget line item, to assist in revitalizing neighborhoods, for which DHCD has promulgated no regulations, but whose application form describes "eligibility criteria" for community development corporation that are not identical to and are more general than the 40F/CDC Standards.

^{7/}We note that, according to the Massachusetts Association of Community Development Corporations (MACDC), a private organization with 65 current members, there are some community development corporations in the Commonwealth that do not conform with all of the 40F/CDC Standards.

^{8/}Government housing authorities as well as private property owners may provide affordable rental housing. See *EC-COI-96-4* (describing several types of rental housing subsidy programs available to governmental and nongovernmental entities). Economic development and industrial corporations, created by municipalities pursuant to G.L. c. 121C, as well as chambers of commerce and private businesses promote economic development. See, e.g., *EC-COI-95-10* (downtown partnership whose purposes include revitalizing business, is not governmental agency).

^{9/}We note that the ABCDC currently receives only \$1000 per year from the State CDFC for serving as a "sponsor" of a loan to a small business enterprise in neighboring community. Even if we were to consider the ABCDC to be performing an essentially governmental function with respect to any future projects financed with State CDFC monies, that would not mean that the ABCDC's overall purposes and functions are essentially governmental.

^{10/}We note that the 40F/CDC Standards include alternative methods for selecting members of the community development corporation's board of directors, other than those elected by the membership. Any "other" members may be appointed by (i) elected state or local officials or (ii) other nonprofit organizations with similar purposes. The ABCDC chose not to require governmental officials to play a role in selecting the four members of its Board of Directors who may be appointed, evidencing an intent not to be subject to governmental control.

^{11/}Given our conclusion, G.L. c. 268A, §§ 17, 19 and 23 may be implicated as a result of your working for the Department and serving on the boards of directors of the ABCDC and Commonwealth Housing. We will provide you separate advice about those issues.

We note that our conclusion might differ if, in the future, for example, the ABCDC's funding from the State CDFC and DHCD for specific projects were to become a significant component of the ABCDC's budget (which the modest \$1000 is not) and there were significant governmental control over the ABCDC. If the facts change in any material way, please contact us for further advice.

^{12/}This discussion also applies to *EC-COI-85-77*, which, without further analysis, rested on the earlier opinion.